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SUBJECT: MALAWI: SPECIAL LAW COMMISSION RELEASES CONSTITUTIONAL REVIEW REPORT

¶1. (SBU) Summary: The Special Law Commission, which was mandated in 2005 to recommend improvements to Malawi's hastily-drafted 1994 Constitution, released an ambitious report on October 12. The review produced a number of controversial recommendations relevant to the current Malawian political scene. Among them were: reintroduction of a Senate, the re-establishment of a recall provision for Members of Parliament, a clarification on the Presidential two-term limit, and concurrent local, Parliamentary and presidential elections. The Commission compiled its general recommendations into two bills to be presented to the National Assembly. Comment: Though the report makes valid points, most local observers expect little action on these recommendations in the near term given strong opposition from one quarter or another. End Summary.

Special Law Commission Members and Procedures

¶2. (U) The Special Law Commission (SLC) was created in 2005 to review Malawi's 1994 Constitution. SLC Membership included representation from the judiciary, the civil service, civil society, gender interest groups, the Law Society, religious groups, academia and eminent citizens. The Commission met for three days once or twice a month for a total period of eight months. During these meetings, the Commission analyzed submissions from the general public which were compiled into an Issues Paper. The Commission also looked at a Consultation Paper which had been developed from views of stakeholders who had attended workshops and meetings in all three major regions of the country. The Special Commission also examined several comparable Constitutions from selected countries within the Southern Africa region, and from other common law jurisdictions.

¶3. (SBU) The Special Law Commission's review exercise was necessitated by three factors. First, the Constitution was drafted in a hurried manner in 1993-1994 and left a number of crucial legal gaps. Second, the numerous amendments to the Constitution to correct these gaps have not been made in a systematic way and have resulted in apparent conflicts among some of the provisions. Third, frequent court litigation, especially among political players, has created the perception that the Constitution is inadequate to address a number of governance issues. The major areas addressed in the report relate to the National Assembly, the Presidency, and the Elections process.

The National Assembly

¶4. (U) The Commission recommended that the Senate should be re-introduced as a second chamber of Parliament. The Senate would be comprised of both elected and nominated members to make a total of seventy Senators. Their breakdown would be as follows: one senator from each of the 28 districts nominated by local government authorities; ten chiefs; ten senators representing women, people with disabilities and trade unions; nineteen experts from various fields and three senators representing the major religious faiths. The Senate was provided for by the previous Constitution, but was

abolished by Constitutional amendment in 2001. The Commission further recommended that the primary purpose of the Senate should be deliberative, scrutinizing and confirming or amending bills from the National Assembly, but not creating its own legislation. In general, the Commission's opinion was that the second chamber should not seek to usurp the role of the National Assembly as the pre-eminent chamber of Parliament.

15. (U) The Commission recommended a reintroduction of the recall provision for Members of the National Assembly, citing two reasons. First, the Commission concluded that the exercise of power is conditional upon sustained trust of the people of Malawi as required by the Constitution. Second, the Commission found that since a President or a Judge may be impeached, there was a need for similar treatment for Members of Parliament to promote transparency and accountability in the conduct of their business.

16. (U) The Commission also recommended that the current arrangement under which the President and the Speaker consult to convene Parliament should be retained. This arrangement has previously been criticized for allowing the President to undermine the independence of the Legislature.

The Presidency: No Comeback for Muluzi

17. (U) The Commission recommended the deletion of the word "consecutive" in section 83 (3) of the Malawi Constitution. This would make it clear that a person can only be President of Malawi for a maximum of two terms, whether consecutive or not. In order to further remove any possibility of doubt on the recommendation, the Commission also recommended that the Parliamentary and Presidential Elections Act be amended to include an eligibility provision barring any presidential candidate who has served for two terms from standing for and being elected to the office of President

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18. (U) The Commission further recommended that a President should have a first (bachelor's) degree from a recognized institution.

The Election Process

19. (U) The Commission recommended that local government elections should take place concurrently with general elections for members of the National Assembly and the Presidency. Under the current Constitution, local government elections are supposed to be held a year after the Presidential and Parliamentary elections. The failure by government to hold the 2005 local elections influenced the Commission's recommendation in favor of the "tripartite elections" option.

110. (U) By custom, Commissioners of the Malawi Electoral Commission (MEC) are political party representatives. Only the MEC's Chair, a judge, is non-partisan. The current law states Commissioners are appointed by the President in consultation with leaders of parties represented in the National Assembly on terms and conditions determined by the National Assembly's Public Appointments Committee. The Special Law Commission recommended that a more transparent procedure be put in the Electoral Commission Act to ensure accountability. The recommendations stipulate that a panel of specialists should be established to make the MEC appointments.

111. (U) Currently, the President of Malawi can be elected by a plurality of votes cast. The Commission recommended that the President should be elected by a majority of more than fifty percent of the valid votes cast through a free and fair election. If no candidate receives a majority in the general election, the Commission recommended the use of a run-off election between the top two candidates.

Comment: Don't Hold Your Breath

¶12. (U) In addition to the report, the Special Law Commission compiled its general recommendations into two bills to be passed to the National Assembly through the Ministry of Justice. The first bill details 54 amendments to the Constitution which can be approved by a two-thirds majority of the National Assembly. The seconds bill details 13 amendments that affect the basic rights guaranteed by the Constitution and thus would require a referendum.

¶13. (SBU) Comment: While the Commission's report contains many sound proposals, some recommendations lack crucial implementation details.

An example is the National Assembly recall provision, which does not specify on what grounds an MP (most of whom are originally elected by only a small minority of the voters in elections with numerous candidates) could be recalled. Moreover, several recommendations run contrary to the interests of leading opposition figures or the GOM and are thus unlikely to be passed in the near term. For instance, the requirement of a first degree and clarification of Presidential term limits would block former President and United Democratic Front leader Bakili Muluzi's bid to run for President again in 2009. Muluzi's candidacy is reliant on the lack of clarity in the presidential term limit clause in the constitution. The recommendation regarding a fifty percent majority in the presidential election is a hurdle probably unwelcome by all potential 2009 presidential candidates, none of whom can likely muster a majority without facing a run-off election.

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